

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEITH GREEN,

Defendant-Appellant.

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UNPUBLISHED

July 8, 2003

No. 235045

Wayne Circuit Court

LC No. 00-010919

Before: Owens, P.J., and Bandstra and Murray, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree murder, MCL 750.316, assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent terms of life imprisonment for the murder conviction and thirty to sixty years' imprisonment for the assault conviction, to be served consecutive to a two-year term for the felony-firearm conviction. He appeals as of right. We reverse.

Defendant was convicted of shooting two people in a van on May 21, 1999. The driver and a front-seat passenger were shot from behind by the rear-seat passenger. The driver, Quan Bell, died of his injuries. The passenger, Raymond Williams, survived and testified as the principal witness at trial. At first, he identified another person as the shooter based on a photo lineup. However, he later retracted that identification after viewing the man in person at the preliminary examination.

After the police reopened the investigation, Williams selected defendant's photo from a new photographic lineup. At trial, Williams testified that he had not known defendant previously, but that he was sure that defendant was the person who talked to Bell, briefly walked in front of the van to get to the passenger side, and got into the back seat from which the shots were fired. Bell's girlfriend, Jackie Anderson, was not present during the incident, but testified that Williams had described defendant as the shooter by the nickname "Uncle." She did not tell the police about this description.

The other key witness at trial was Ricky Jackson, who initially denied to police knowing what had happened, but later gave a statement alleging that he saw defendant get into the van. At both the preliminary examination and at trial, however, Jackson testified that he did not know the identity of the shooter.

A firearm was not recovered, and there was no fingerprint evidence linking defendant to the interior or exterior of the van. Defendant presented no witnesses at trial. The defense attacked the identification testimony and argued that the police had arrested the wrong man.

The prosecutor admits on appeal that certain errors occurred at trial, but argues that the errors were harmless.

## I

Defendant contends that the prosecutor committed misconduct by arguing to the jury during closing argument that the district judge, in binding defendant over for trial, found the prosecution's witnesses to be credible despite defendant's attempts to impeach them. Defendant objected to testimony about him being bound over for trial, arguing that it was irrelevant, but did not object to the prosecutor's closing argument.

Ordinarily, we review a trial court's evidentiary rulings for an abuse of discretion. *People v Cain*, 238 Mich App 95, 122; 605 NW2d 28 (1999). When reviewing unpreserved claims of error regarding a prosecutor's closing arguments, we must determine whether a plain error affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Reversal is required only when a plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Id.*, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993)

At trial, the prosecutor asked the officer in charge of transporting defendant to the courthouse about a statement Jackson allegedly made after the preliminary examination. Jackson purportedly admitted to the officer that, in order to protect himself, he lied when he testified that he did not know the identity of the shooter:

Q. What did he say?

A. He said he knows everybody involved in the case and he was afraid.

Q. And that occurred at the preliminary exam in September?

A. That occurred at the preliminary exam of Mr. Keithon Green.

Q. September of last year?

A. That's correct.

Q. *And notwithstanding Ricky Jackson's recantation or lies, the case was still bound over to circuit court?*

A. Yes, ma'am.

Q. The Judge there still made a probable cause finding?

MR. CRIPPS: Judge, objection as to the relevancy of that.

THE COURT: It's the history of the criminal procedure in this case. I don't see anything wrong with it.

\* \* \*

*Q. And notwithstanding Ricky Jackson's lies on the stand, Judge Leona Lloyd still found probable cause that Keithon Green [sic] was responsible for the murder and assault with intent to murder and felony firearm as to Keithon Green [sic] relating to the complaint in this case?*

*A. Yes, ma'am. [Emphasis added.]*

Subsequently, in her closing argument, the prosecutor argued that the bindover meant that the district judge had found Raymond Williams to be credible. While summarizing Williams' preliminary examination testimony, and specifically a question asked by the district judge, the prosecutor stated:

*And finally, by the Court herself, the Court who makes a decision on whether to bind Mr. Green over for trial. The Court asked Mr. Williams, page 83 of the exam transcript:*

*"Question: Is it your testimony today that you are positively identifying the Defendant as the person who was in the van that day?*

*"Answer: Yes."*

*That is the Court, who makes a decision on believability and credibility in deciding the case of People versus Keith Green at the district court level. [Emphasis added.]*

On appeal, the prosecution concedes that the evidence should not have been admitted, but contends that it was not outcome determinative.

It is well established that a prosecutor may not vouch for a witness's credibility. *People v Ramsdell*, 230 Mich App 386, 404; 585 NW2d 1 (1998). In addition, a trial judge may not comment on the credibility of a witness. *Lansing v Hartsuff*, 213 Mich App 338, 349-350; 539 NW2d 781 (1995). In fact, because the jury is the sole determiner of credibility, it is improper for any party, including a prosecutor, to even *ask* a witness to comment on another witness's credibility. *People v Messenger*, 221 Mich App 171, 180; 561 NW2d 463 (1997). Accordingly, we agree that the trial court abused its discretion in allowing the prosecution to admit evidence implying that the district judge found Jackson to be credible. *Cain, supra* at 122. For the same reasons, we also believe that it was plainly erroneous for the prosecutor to bolster Williams's credibility by noting the district judge's decision to bind defendant over for trial.<sup>1</sup>

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<sup>1</sup> Indeed, if a prosecutor were permitted to argue to a jury that an examining magistrate had found a witness to be credible, it would have a chilling effect on a defendant's exercise of his statutory right to a preliminary examination, MCL 766.1.

The prosecutor argues on appeal that the error was harmless, or not outcome determinative, because Williams gave an “unequivocal” identification of defendant, and because the jury was instructed that they could decide the facts of the case. We disagree. The suggestion that Williams’ identification testimony was “unequivocal” is not supported by the record. Williams previously identified another individual as the shooter, recanting this identification only after viewing this individual in person. He picked out defendant’s photograph about a year and a half after the offense, and saw him in person at the preliminary examination conducted on September 25, 2000. Williams had never known the shooter before the incident, and, on the day of the incident, he first saw the man briefly at Bell’s window, and then only while the man walked in front of the van (where he was not fully visible) and toward the door behind Williams. Williams initially identified someone else, gave inconsistent descriptions to various persons, and was impeached by evidence that he gave the police a false name. He also admitted smoking marijuana and drinking vodka on the day of the incident, albeit in small amounts.

Moreover, the only other person with any connection to the incident was Ricky Jackson, who three times (twice under oath) denied knowing anything about the shooting. The only contrary evidence was a statement to a police officer, which Jackson characterized as having been given under duress and while under arrest. While the contents of the statement to the police officer suggest that Jackson did not know something about the shooting, the statement was only admissible to impeach his trial testimony that he did not know anything about the shooting. As hearsay, MRE 801(a), the evidence was not admissible as substantive evidence of defendant’s guilt.<sup>2</sup>

Thus, this was a circumstantial case built upon inconsistent testimony. The credibility of Williams’ identification testimony was critical to a determination of defendant’s guilt or innocence.<sup>3</sup> Under the circumstances, the prosecutor’s use of the district court judge’s bindover decision to buttress the prosecution’s case was unfairly prejudicial, affected defendant’s substantial rights, and affected the fairness and integrity of the judicial proceedings. Accordingly, reversal is required.<sup>4</sup> *Carines, supra* at 763-764.

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<sup>2</sup> The statement does not qualify as an exception to hearsay under MRE 801(d)(1)(A) because the declarant did not give the prior statement under oath.

<sup>3</sup> Our dissenting colleague opines that “it was certainly reasonable for the jury to conclude that Williams’ account was more credible.” While that is generally true, we believe that the jury’s resolution of the credibility question in this case was tainted by the prosecutor’s elicitation of evidence indicating that the credibility question had previously been resolved by a judge. We are not persuaded that a curative instruction would have removed the taint caused by laypersons on a jury being informed that a learned judge had already resolved the credibility question, which they were supposed to decide, in a certain manner. Further, we believe that, independent of defendant’s actual guilt, the fairness and integrity of the proceeding was seriously affected by the prosecutor’s plainly improper, multiple references to a judge’s resolution of the credibility question.

<sup>4</sup> In light of our ruling, we need not address defendant’s remaining issues.

We reverse and remand for a new trial. We do not retain jurisdiction.

/s/ Donald S. Owens

/s/ Richard A. Bandstra